No. 16,298

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of the Estate of John Elvins King,
Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a corporation,
Appellee.

APPELLANT'S REPLY BRIEF.

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FOREWORD.

Both parties agree that the determinative question on the appeal is whether the California workmen's compensation law ousted the District Court of jurisdiction to entertain appellant's suit in admiralty under the Death on the High Seas Act. (41 Stat. 537, 46 U.S.C.A., §§761-768.)

That act was enacted March 30, 1920. It was enacted after the Supreme Court in *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, decided May 21, 1917, had declared (1) that maritime accidents were within admiralty jurisdiction and state

workmen's compensation laws invading that field were inapplicable and invalid, and (2) that remedies under such compensation laws were not common law remedies saved to suitors under the constitution and the Judiciary Act.

The Jensen decision prompted Congress to pass the Act of October 6, 1957. (40 Stat. 895.) This attempted to amend §§ 24 (3) and 256 of the Judicial Code relating to admiralty and maritime jurisdiction (28 U.S.C.A., §§ 41 (3), 256), by adding to the clause saving common law remedies to suitors, the words: "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." The amendment was held unconstitutional in *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, decided May 17, 1920.

Congress repeated the attempt by the Act of June 10, 1922. (42 Stat. 734.) The words to be added to the saving clause by that act were these: "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the Workmen's Compensation Law of any state, district, territory or possession of the United States, which rights and remedies when conferred by such law shall be exclusive." This amendment was likewise held unconstitutional in *State of Washington v. Dawson & Co.,* 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646, decided February 25, 1924.

It thus appears that the Death on the High Seas Act creating a cause of action in admiralty for wrong-

ful death was enacted at a time when the Supreme Court had excluded workmen's compensation laws from the field of maritime torts, and at a time when Congress had failed in an attempt to have them included within that field. And it thus appears, moreover, that after Congress had enacted the Death on the High Seas Act it still deemed further legislation necessary in order to permit state workmen's compensation laws to enter the field of maritime tort.

That the doctrine of the *Jensen* case prevails over state workmen's compensation laws where maritime torts are concerned, is plain. (*Standard Dredging Co. v. Murphy,* 1943, 319 U.S. 306, 310, 63 S.Ct. 1067, 87 L.Ed. 1416; *Pennsylvania R. Co. v. O'Rourke,* 344 U.S. 334, 336, 337, 73 S.Ct. 302, 97 L.Ed. 367.)

In contending that the court below should have entertained her suit in admiralty under the Death on the High Seas Act, appellant was content in her opening brief to rely upon two decisions of this court (*Higa v. Transocean Airlines,* 230 F. 2d 780; *Trihey v. Transocean Air Lines, Inc.,* 255 F. 2d 824), and one by the court in the second circuit (*D'Aleman v. Pan American World Airways,* 259 F. 2d 493).

In the *Higa* case, this court said at page 785:

> "Here, however, the Death on the High Seas Act, creates the right to recover for wrongful death and designates not only the federal court for its enforcement, but a particular jurisdiction of that court. The right is a matter of federal law where state courts have no special competence. There is more here that 'the grant of jurisdiction,

of itself . . .' which indicates that jurisdiction was intended to be exclusive."

In the *Trihey* case, this court said at page 826:

"It (the action) arises under the Death on the High Seas Act, 46 U.S.C.A. §§ 761-768 (hereinafter, D.H.S.A.). Exclusive jurisdiction is conferred on the admiralty court. 46 U.S.C.A. § 761; *Higa v. Transocean Airlines,* 9 Cir. 1955, 230 F. 2d 780."

And in the *D'Aleman* case, the court said at page 495:

"The purpose of the Act (DHSA) was to create a uniform cause of action where none existed before and which arose beyond the territorial limits of the United States or any State thereof. * * * The Act was designed to create a cause of action in an area not theretofore under the jurisdiction of any court. The means of transportation into the area is of no importance."

In the *Higa* case this court referred with approval to the decision of Judge Goodman in *Wilson v. Transocean Airlines,* D.C.Cal. 1954, 121 F. Supp. 85. At pages 92 and 93, following a careful review of the history of the Act, it is there said:

"It is clear that the scope of the Death on the High Seas Act, within the geographical area of its operation, was intended to be as broad as the traditional tort jurisdiction of admiralty. As has been noted, the purpose of the Act was to afford a uniform right of action for death resulting from wrongful acts within the admiralty jurisdiction, excepting state territorial waters. The extent

of the right of action given by the Act is not defined in terms of the nature or the wrongful act causing death, but solely in terms of the locale of the act. The statute declares that there shall be a right of action 'Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas.' 46 U.S.C.A. § 761. A further indication that the statute encompasses all tortious acts on the high seas within the established jurisdiction of admiralty, is the language that suit may be brought against whoever 'would have been liable if death had not ensued.' "

The points urged by appellee in its brief will be separately answered.

---

1. SECTION 7 OF THE DEATH ON THE HIGH SEAS ACT DOES NOT FURNISH A BASIS FOR THE JUDGMENT OF OUSTER.

Said section 7 (46 U.S.C.A. § 767) provides:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limit of any State, or to any navigable waters in the Panama Canal Zone."

The appellee contends that section 7 authorized the judgment of ouster. The contention is unsound. This court reviewed the history of the section and the circumstances surrounding its enactment and reached a conclusion contrary to the contention in the *Higa* case. (230 F. 2d 780, 782-785.) It characterized as

excellent (p. 784) the opinion of Judge Goodman in *Wilson v. Transocean Airlines,* D.C.Cal. 1956, 121 F. Supp. 780, where it was said, commencing at page 90 respecting said section 7:

> "(1, 2) So, while the Mann amendment provides a strong argument that the Death on the High Seas Act does not supersede state wrongful death statutes on the high seas, the argument is not so strong but what it is overcome by other considerations. The Death on the High Seas Act was prompted, in large part, by the desire to put an end to the uncertainties attending the application of state statutes to death on the high seas. Many of these uncertainties would remain to plague both courts and litigants if the state statutes could still be availed of by suitors. In addition, since the Death on the High Seas Act was drawn with the purpose to afford an exclusive, uniform federal right of action for death on the high seas, the right of action which it created is not appropriate to serve as a mere supplement to state-created rights of action on the high seas.
>
> Moreover, any attempt to apply a state wrongful death statute to a death occurring on the high seas, would, today raise a serious constitutional question. For decisions of the Supreme Court subsequent to its decision in The Hamilton, supra, in 1907, have cast doubt on the continued vitality of the holding in that case that a state has power to create a right of action for death on the high high seas. In the celebrated case of Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, in 1917, and in cases that followed, the Supreme Court greatly broadened the scope of the doctrine that state statutes cannot interfere

with the essential uniformity of the maritime law. After the Jensen decision, the Supreme Court reaffirmed the power of the state to give a right of action for deaths occurring on their *territorial waters,* stating that such legislation was within the 'maritime but local' exception to the Jensen rule. Western Fuel Co. v. Garcia, 1921, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210. But since it would be difficult to bring a state-created right of action for death on the *high seas* within this exception, it is doubtful that the Supreme Court would now sanction the application of state death statutes to deaths on the high seas. * * *

Finally, in all the years that have elapsed since the passage of the Death on the High Seas Act, it appears to have been the unanimous view of both the cases and the commentators that the Act supersedes the state wrongful death statutes as to actions for death occurring on the high seas. An ambiguous and ill-considered amendment to the bill which became the Act, is not sufficient justification for reaching a contrary conclusion at this late date."

One of the cases cited by Judge Goodman in reaching the foregoing conclusions (p. 91, note 22) is *Echavarria v. Atlantic & Caribbean Steam Nav. Co.,* D.C. N.Y. 1935, 10 F. Supp. 677. At page 678 it is there said:

"(1) With the enactment of the Federal Death Act, the conclusion cannot be avoided that the death statutes of the several states were superseded so far as they had been theretofore applied to death on the high seas.

(2) It is clear that Congress could pass such an act under its power to regulate commerce and in pursuance to the constitutional provision extending the judicial power of the government to all cases of admiralty and maritime jurisdiction.

(3) Section 7 of the act (46 USCA § 767) indicates a carefully devised congressional plan to leave unaffected the operation of state death statutes over waters within one league of shore. Section 1 (46 USCA § 761) makes no mention of the state statutes, and there is implied in that omission the congressional intent that their operative force with respect to torts committed more than three miles from land be ended. The state statutes diverse in their terms and conflicting in remedies, afforded a poor substitute for a uniform act which Congress alone could legislate. They applied, none the less upon the theory that creating rights concerning a subject within the domain of the paramount authority of Congress to legislate so long as Congress failed to enact a statute relating to the same subject. In view of the congressional action, they can no longer be applied to American ships on the high seas."

Reference must also be made to the "twilight zone" cases in which it is held that resort may be had, *at the election of a claimant,* to either a federal or state forum offering concurrent rights and remedies. (*Davis v. Department of Labor,* 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246; *Hahn v. Ross Island Sand & Gravel Co.,* 79 S.Ct. 266, 267.) Appellant's "election" here was under the Death on the High Seas Act.

2. OWNERS OF AIRLINES OPERATING OVER THE HIGH SEAS ARE LIABLE UNDER THE DEATH ON THE HIGH SEAS ACT FOR FAULT OCCURRING ON THE HIGH SEAS AND CAUSING THE DEATH OF AN EMPLOYEE.

Appellee apparently concedes that an airline is liable under the Death on the High Seas Act for the death of a passenger caused by the fault of the airline. But appellee is reluctant to make the same concession where the decedent is an employee.

Section 1 of the Act (46 U.S.C.A. § 761) provides that "*whenever the death of a person* shall be caused by wrongful act, neglect, or default on the high seas beyond a marine league from the shore," the personal representative of the decedent "may maintain a suit for damages in the district courts of the United States, in admiralty" for the benefit of designated relatives of the decedent.

Unquestionably, the deceased employee was "a person." And unquestionably, the act extends to wrongful death of employees. That has been the holding in cases where the personal representative has sued such employer under the Act. (*Polland v. Seas Shipping Co., Inc.,* 2 Cir. 1945, 146 F. 2d 875, 877; *The Black Gull,* 2 Cir. 1936, 82 F. 2d 758, 759; *Decker v. Moore-McCormack Lines, Inc.,* D.C.Mass. 1950, 91 F. Supp. 560, 561; *Batkiewicz v. Seas Shipping Co.,* D.C.N.Y. 1943, 53 F. Supp. 802, 803; *The Four Sisters,* D.C. Mass. 1947, 75 F. Supp. 399, 400.)

And contrary to what appellee supposes the Act is not a survival statute, nor is the cause of action it

creates derivative. It confers no right of action upon the decedent. It confers a right of action upon the personal representative of the decedent for the benefit of designated relatives of the decedent for the damages they have suffered by reason of his wrongful death. (*Decker v. Moore-McCormack Lines, Inc.,* supra; *Pickles v. F. Leyland & Co.,* D.C. Mass. 1925, 10 F. 2d 371, 372.)

As the above cases show, there is nothing cryptic about section 5 of the Act. (46 U.S.C.A. § 765.) For example, if a seaman is injured in the service of his ship on the high seas through fault of his employer, he may sue the employer for damages under the Jones Act (46 U.S.C.A. § 688), and if the injured seaman dies while the Jones Act suit is pending his personal representative and a suit under the Death on the High Seas Act may, by said section 5, be substituted therefor.

Appellee points out in its brief that a cause of action under the Death on the High Seas Act was approved in *Fernandez v. Linea Aeropostal Venezolana,* D.C.N.Y. 1957, 156 F. Supp. 94, where the decedent was an airline stewardess whose death was caused when the plane crashed on the high seas. She was an American citizen. (67 Yale Law Journal 1452, note 22.) Appellee quarrels with various aspects of the case but one thing is clear and that is that the court approved a cause of action under the Death on the High Seas Act resulting from the death of an employee of the airline.

3. THE CALIFORNIA WORKMEN'S COMPENSATION LAWS FURNISHED NO BASIS FOR THE JUDGMENT OF OUSTER.

In its brief the appellee deemed it significant that none of the cases cited in appellant's opening brief involved death of one having employee status at the time the wrongful act, neglect, or default occurred on the high seas. If significant at all, which appellant denies, the element has been eliminated by the *Fernandez* case, cited by appellee, where the death of the airline stewardess was caused by the *fault* of the airline occurring on the high seas, and by the cases cited herein where death of seamen employees was caused by the *fault* of shipowners or operators occurring on the high seas.

In turn, appellant deems it significant that none of the cases upon which the judgment of ouster was based in this case (*King v. Pan American World Airways,* D.C.Cal. 1958, 166 F. Supp. 136, 138), or upon which appellee relies, involved death on the high seas or the Death on the High Seas Act. All such cases fall within the "twilight zone" group where waterfront cases or cases with amphibious characteristics combining land-and-water employment are involved. Factually all such cases involve accidents occurring on or about local territorial waters. None involved a specific federal statute, such as the Jones Act (45 U.S.C.A. § 688) or the Death on the High Seas Act (45 U.S.C.A. § 761) constitutionally occupying or preempting a field in which federal jurisdiction is constitutionally paramount, and creating a right and remedy where *tort liability* exists and declaring the forum for redress.

Cases earlier cited herein demonstrate that federal statutes of that type are not to be subordinated to or ousted by state workmen's compensation laws. In the recent case of *Schellenger v. Zubik,* D.C.Penn. 1949, 170 F. Supp. 92, it was vigorously said, at page 93:

> "Is a seaman who signs a State Workmen's Compensation agreement and receives payments thereunder, and executes a final receipt, barred from recovery of his rights under the Jones Act and under the doctrine of unseaworthiness?
>
> (1) Upon evaluation of the underlying purport of admiralty law and the decisional law of this Circuit and the Supreme Court of the United States, I conclude the answer in the negative.
>
> (2) This Circuit, invoking the views of the Supreme Court of the United States, and recognizing the rights and immunities of seamen, has noted with foreboding efforts to bring seamen, who under federal admiralty acts are entitled to sue for compensation for injuries in federal courts, within the scope of state compensation acts. Such efforts are unconstitutional as destroying the characteristic features of general maritime law, contravening its essential purposes, encroaching upon the paramount power of the Congress to enact national maritime laws and invading the jurisdiction which Congress has conferred upon courts of admiralty.
>
> (3) Such a contract as defendant seeks to invoke, even if otherwise good, would still be void because opposed to public policy. * * *
>
> (4) In the event plaintiff recovers a verdict in this action, this court will be free to apply equi-

> table principles and set off compensation payments from the amount of the award. Panichella v. Penna. R. Co., D.C. 167 F. Supp. 345."

The holding of the California Supreme Court respecting the workmen's compensation laws of California is in accord with the *Schellenger* case (*Occidental Ins. Co. v. Ind. Acc. Comm.,* 24 Cal. 2d 310, 149 P. 2d 841), and the view of the California Supreme Court in the *Occidental Insurance Company* case that California workmen's compensation laws are subordinate to specific federal statutes in maritime and admiralty matters have been approved in this circuit (*The Betsy Ross,* 9 Cir. 1944, 145 F. 2d 688, 689, 149 P. 2d 841; *Reynolds v. Royal Mail Lines,* D.C.Cal. 1956, 147 F. Supp. 223, 226).

Moreover, the workmen's compensation laws of California are self-subordinating to specific federal statutes of the character of the Jones Act or the Death on the High Seas Act. Thus Labor Code, § 3203, forming part of the workmen's compensation law, provides as follows:

> "The provisions of Division 4 and Division 5 shall not apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the State, nor to employees injured while they are so engaged, except in so far as such divisions are permitted to apply under the Constitution or laws of the United States."

4. THE DOCTRINE OF RES JUDICATA IS INAPPLICABLE.

Appellee, citing *Sherrer v. Sherrer,* 1948, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429, invokes the compensation "award" as res judicata. (BA 12.)

Appellant did not invoke the state compensation laws. Appellee invoked them and the commission proceeded to an "award" over the protests and objections of appellant. (T. 18.) The Commission disclaimed that it had jurisdiction "to the exclusion of any rights of action on the part of dependents of the deceased employee(s) under the High Seas Death Act." (T. 30.) Liability under the Death on the High Seas Act depended upon the establishment of fault on the part of the employer. Liability under the state workmen's compensation laws could be established, of course, without showing fault on the part of the employer.

Appellant has earlier cited cases, including cases decided by the California Supreme Court, that jurisdiction of the district court in admiralty in matters such as this is paramount and exclusive, and that the so-called "award" by the Commission is without jurisdiction and invalid. That situation presents no problem of res judicata for there is none. Appellant has also earlier cited cases, "twilight zone" cases, where applicable federal and state laws give a claimant a right of election to resort to whichever he chooses. The rights under these laws are concurrent, and recovery under one is not a bar to additional rights under the other. It is the claimant, however, who makes the election. It is not forced upon him. If he

accepts payments under one, he cannot duplicate them under the other. (*Western Boat Bldg. Co. v. O'Leary,* 9 Cir. 1952, 198 F. 2d 409, 412-413.)

Obviously, there is no problem of res judicata here.

CONCLUSION.

Appellant therefore again respectfully submits that the summary judgment in favor of appellee should be reversed with directions to the District Court to hear and determine the suit in admiralty.

Dated, San Francisco, California,
May 29, 1959.

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